IN THE

Supreme Court of the United States

DEC 10 1951
CHARLES ELMORE CRO
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OCTOBER TERM, 1951.
No. 475

CONFERENCE OF STUDIO UNION, an unincorporated association, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners (appellants and plaintiffs and intervenors), pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Southern District of California.

The judgment of the District Court was entered after granting a motion of the defendants for judgment on the pleadings made prior to trial. The action was one for damages and for an injunction under the United States anti-trust laws, based upon an Allen Bradley type of con-

spiracy* on the part of the major motion picture producers and a group of unions, directed against smaller, independent motion picture producers, and plaintiff labor organizations.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 2, 1951. At this writing the opinion has not yet been officially reported.

Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1) and 2101(c).

Statement of the Matter Involved.**

In 1946 several thousands of employees in the motion picture industry were discharged and denied opportunity for re-employment, and a group of labor organizations was destroyed as part of a plan between the labor defendants (here called IATSE) and the motion picture producer defendants (here called Majors) [R. 29-30, 32-33] to eliminate a group of smaller motion picture producers from competition. [R. 28-29, Complaint Par. XII.] These consequences were not incidental or remote, but were specifically planned by the conspiring defendants as a necessary means to accomplish their ends. [R. 29,

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*A combination to violate the anti-trust laws, whose participants include labor and non-labor elements. (*Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797.)

**As the case was decided on the pleadings alone, without evidence, references are to *allegations* of the Complaint.

Complaint Par. XII(e); R. 31-33, Complaint Par. XIII, and particularly XIII(e), (f), (g) and (h).]

The circumstances necessary to understand these events may be stated briefly.

Majors are the ten largest producers of motion pictures [R. 11-15.] Included with them as defendants were several wholly owned and affiliated distributing companies. [R. 15.] For the purpose of carrying out the conspiracy, the activities of Majors were coordinated through a single corporation, Motion Picture Association of America, Inc. [R. 19-20.] Majors are engaged in interstate commerce among the several states in the manufacture of film [R. 21-24]; distribution is carried on among the several states and with foreign countries. [R. 27.]

A group of smaller producing companies (here called the Independents) likewise in interstate commerce, compete with the Majors. [R. 27.] The Independents produce fewer and less costly films; they employ about one-fifth of the number of persons employed by the Majors; their financial resources are not comparable to those of the Majors. [R. 28.]

Defendant IATSE controls a number of crafts which are indispensable for the production of motion pictures. [R. 30, Complaint Par. XII(i).] Plaintiff labor organizations represented other crafts which also work in the motion picture industry. [R. 8-10.] (Except where the distinction is necessary to sense, plaintiffs and intervenors are here called Conference.)

The essential plan of this conspiracy was this: by discriminatory rates favoring Majors and by furnishing its most skilled labor to Majors, IATSE would drive the Independents from the producing field and eliminate them as competitors. [R. 28-31.] As an inducement to IATSE, and as part of the same conspiracy, Majors would discharge employees affiliated with Conference and would refuse to re-employ them except under yellow-dog conditions. [R. 29, 30, especially Complaint Par. XII(e).] To meet the anticipated shortage of product and to prevent unequal advantage among the Majors, they agreed to hoard completed films, to curtail distribution, to stretch playing time in controlled houses, to force longer runs in independent houses, and to re-release old films. [R. 30, Complaint Par. XII(g); R. 32, Complaint Par. XIII(a), (b), (c) and (d).] No independent action was to be taken by any of the defendants until the plan had been carried out. [R. 31.] At the time the suit was commenced the conspiracy was largely consummated. [R. 31-36.]

The Complaint asked for a recovery of losses sustained by the labor organizations and by an individual suing in a representative capacity for himself and all others who had been discharged; the Complaint also asked for an injunction to restrain the continuation of the conspiracy. [R. 38-39.] Several hundred employees who had been discharged by Majors as part of the conspiracy were allowed to intervene, and in effect joined in the Complaint. [R. 71, 74-83, 89-93.] Motions to dismiss were denied

[R. 40, 97, 98, 99]; and answers were filed by all appearing defendants. [R. 44, 100, 103, 109 and 112.] However before trial the District Court granted motions for judgment on the pleadings. [R. 142.] (Its order is printed in the Appendix.)

The Court of Appeals affirmed on a ground rejected by the District Court.

Questions Presented.

1. A conspiracy to restrain trade in violation of the United States anti-trust laws succeeds in carrying out its plan, a portion of which grievously injures plaintiffs but would not, standing alone, directly restrain trade; may the plaintiff have relief in the United States courts?

2. A group of manufacturers and distributors in interstate commerce seeking to eliminate competitors engage the assistance of a group of labor unions, and as *quid pro quo* for that assistance promise to and do destroy other labor unions (plaintiffs) and deprive hundreds of employees (plaintiffs and intervenors) of work and job opportunity: are the losses caused to plaintiffs and intervenors compensable under Title 15 U. S. C. A., Section 15?

3. Is only that loss recoverable under the United States anti-trust laws which is directly caused by restraint of trade, or may there be recovery for injuries to business or property by reason of *anything forbidden* by the anti-trust laws?

4. Is the general rule of tort which permits recovery for all damages expressly undertaken and directly caused by an unlawful conspiracy applicable to conspiracies in restraint of trade, or is recovery limited to those injuries which flow from the successful consummation of a conspiracy in restraint of trade?

5. If conduct injurious to a third person is promised and performed as an inducement to another to assist in restraining trade, is not the injurious conduct in the chain of causation which tends to bring about the restraint of trade?

Reasons Relied on for the Allowance of the Writ.

The petitioners believe the applicable principles of decision have been settled, but no decision has been found on precisely similar or closely analogous facts. For this reason the reasons relied on for the allowance of the writ must be deemed stated in the alternative.

1. The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal on the same matter.

2. The decision of the Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court.

ARGUMENT.

The Conspiracy Violated the Anti-Trust Laws; Any Injury Deliberately Planned and Carried Out as Part of the Necessary Means of the Conspirators Is Compensable Under the Anti-Trust Laws.

Pertinent language from the controlling statutes is:

> "Every contract, combination . . ., or conspiracy, in restraint of trade of commerce among the several states, . . . is declared to be illegal. . . ." (15 U. S. C. A. 1.)
>
> "Any person who shall be injured in his business or property *by reason of anything forbidden* in the anti-trust laws may sue therefor . . . and shall recover. . . ." (15 U. S. C. A. 15.)*

An analysis of the facts alleged shows a group of traditionally opposed elements—labor and non-labor—combining for the purpose of furthering their own and each others' interests. Majors wanted to eliminate competition by Independents. IATSE wanted to eliminate competition by Conference. For reasons immaterial to decision, each group undertook to do the other's job. Defendant IATSE undertook to eliminate Independents, and in return got the promise of Majors to destroy Conference. The agency which the conspiracy employed to inflict the injuries on plaintiffs were the employers. But the consideration for that conduct was the promise of IATSE to eliminate the Independents. The combination was cemented into unity not only by these reciprocal undertakings but also by the agreement to refrain from economic competition among themselves during the anticipated upheaval [R. 30] and particularly by the agreement

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*These sections of the statutes are quoted in full in the appendix.

on the part of all defendants to refrain from independent actions until the purposes of the conspiracy had been effected.

It is impossible in fact and erroneous in theory to try to isolate a single thread from this pattern. It was the *conspiracy* which caused the injuries here complained of.

The opinion of the Court of Appeals does not say otherwise. Furthermore that opinion proceeds on the assumption that the conspiracy violated the anti-trust laws; but says: "The appellants' connection with the alleged *illegal** conspiracy is not such as would bring them within the contemplation of the anti-trust law." These two premises, to wit, a combination forbidden by the anti-trust laws, and resulting injury to the business and property of plaintiffs should entitle them to relief. (15 U. S. C. A. 15.) But the Court of Appeals affirmed the dismissal on a theory which, it is submitted, is a departure from the law. Given a conspiracy which violates the anti-trust laws, the Court of Appeals creates classes among the consequences of the conspiracy and holds that some consequences are compensable, others are not. The Court says: "The damage alleged to have been suffered by appellants does not flow from any injury to the competitive situation of the motion picture industry, . . ."

This reasoning brings about the following result: a conspiracy, held to violate the laws of the United States, admittedly causes great economic loss; yet plaintiffs are turned out of the United States courts.

It is the purpose of the following portions of this argument to show, briefly, that the Court's reasoning is erroneous, and that its conclusion ought not to be permitted to stand.

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*Emphasis supplied.

The Conspiracy Violated the Anti-Trust Laws.

The use of group power to destroy a competitor who is equipped to compete violates the anti-trust laws. (*William Goldman Theatres v. Loew's, Inc.*, 150 F. 2d 738; *Quemos Theatre Co. v. Warner Bros. Pictures*, 35 Fed. Supp. 949; *McIntire v. Wm. Penn Broadcasting Co.*, 151 F. 2d 597, cert. den. 327 U. S. 779.) Horizontal agreements to curtail production and to stifle distribution are unlawful. (*United States v. Crescent Amusement Co.*, 323 U. S. 173; *United States v. Eastman Kodak*, 226 Fed. 62, appeal dismissed 255 U. S. 578; *Hartford Empire v. U. S.*, 323 U. S. 386.)

Either an unlawful purpose or an agreement to make use of unlawful means makes the whole conspiracy unlawful. (*Lynch v. Magnovox Co.*, 94 F. 2d 983; *National Fire Proofing Co. v. Mason Builders Association*, 169 Fed. 259; *McCann v. New York Stock Exchange*, 107 F. 2d 908, 912; *Pettibone v. United States*, 148 U. S. 197; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443.)

The conspiracy in the present case had an undebatably criminal purpose: the destruction of the Independents as competitors. It also included unlawful means: agreements to hoard and to stretch products.

A course of conduct, otherwise lawful, is rendered unlawful if it is part of a conspiracy to violate the anti-trust laws. (*Swift v. United States*, 196 U. S. 375; *Standard Oil v. United States*, 283 U. S. 163; *United States v. New York A & P Co.*, 137 F. 2d 459, cert. den. 320 U. S. 783; *United States v. Patten*, 226 U. S. 525, 544.)

A single conspiracy may have several objects (*O'Brien v. United States*, 51 F. 2d 674, 676). In fact a single conspiracy may contemplate several offenses (*Mariano v. United States*, 91 F. 2d 691) without being severable (*Skelly v. United States*, 76 F. 2d 483, 488).

Thus the language of the Complaint [R. 28-29] as well as the authorities, show that in the case at bar there was a single conspiracy having as one of its purposes the violation of the anti-trust laws, and was accordingly unlawful.

Plaintiffs and Intervenors Were Injured as a Direct Result of the Conspiracy.

The injury to plaintiffs and intervenors is alleged to have been caused directly by the conspiracy. [R. 36.]

The opinion of the Court of Appeals cites decisions holding that secondary and more remote consequences of a conspiracy in restraint of trade are not compensable. (*E. g., Loeb v. Eastman Kodak Co.*, 183 Fed. 704; *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 Fed. Supp. 389.) But the injuries inflicted on plaintiffs and intervenors were not a remote or incidental result of the conspiracy. The discharges were deliberately planned as part of the combination [R. 29-30] and the injuries were caused "pursuant to said combination." [R. 31.]

To hold that the injuries to plaintiffs were incidental or remote is not to draw a legal conclusion from the pleaded facts, but, it is submitted, constitutes altering the allegations. On a motion for judgment on the pleadings the facts pleaded must be taken as true. (*Art Metal Construction Co. v. Lehigh Structural Steel Co.*, 116 F.

2d 57; *Friedman v. Washburn Co.*, 145 F. 2d 715; *Ulen Contr. Corp. v. Tri-County Elec. Cooperative*, 1 F. R. D. 284.)

If analysis were permissible or proper, which petitioners deny, it would show that the discharges were parallel in time if not anterior to the injuries to the Independents and therefore could not be remote or secondary consequences of those injuries; if the injuries to Conference and the injuries to Independents be deemed part of a single causal chain, it would appear that the injuries to plaintiffs might be found to be prior in time and within the class of events which would qualify as causing the injuries to Independents. However petitioners urge that such an analysis is improper. The assumption that it is possible or legally permissible to separate the injuries to the Independents from the injuries to plaintiffs should be rejected. Both were consequences of a single conspiracy which was unlawful. The question of whether one consequence caused the other is rendered irrelevant by the fact that both were caused by a conspiracy in violation of the anti-trust laws.

The Statutes Are Mandatory and Give Redress for Injuries Caused by "Anything Forbidden" by the Anti-Trust Laws.

Much of what has been here said up to this point is not in conflict with the decision of the Court of Appeals. Petitioners and that Court apparently agree that the conspiracy violated the anti-trust laws and that plaintiffs were injured as a result of the conspiracy.

The point at which, it is submitted, the Court of Appeals departs from accepted legal principles, is in holding

that only some kinds of injuries to business or property may be compensated. The Court says:

> ". . . in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

We submit that this is not and should not be the applicable rule.

The law provides for compensation for injuries to business or property "by reason of *anything* forbidden in the anti-trust laws." No broader word than the italicized term can be imagined. Nor is it necessary. The heart of the Sherman Act declares that "Every contract, combination, or conspiracy in restraint of trade" is illegal.

These two sections say that one who is injured by a conspiracy in restraint of trade *shall recover* The statute draws no distinction concerning the character of the conduct done to carry out the conspiracy, nor does it contemplate that some unlawful and destructive conduct may be carried out with impunity. It is submitted that it would be unwise, as well as contrary to the plain meaning of the statute, to tolerate some kinds of injuries flowing directly from a planned violation of the federal law.

Further it is clear that the discharges and the injuries to the plaintiffs, since they were the consideration for the conduct by IATSE did tend to create a restraint on commercial competition.

The Decision of the Court of Appeals Conflicts With Settled Principles of Law.

Other courts of appeal have held that damages may be awarded for loss of employment resulting from an anti-trust conspiracy. (*Roseland v. Phister,* 125 F, 2d 417; *Vines v. General Outdoor Advertising,* 171 F. 2d 487; *Gardella v. Chandler,* 172 F. 2d 402.) The Supreme Court has granted an injunction in an analogous case (*Anderson v. Ship Owners, 272* U. S. 359).

In other Sherman Act cases injunctions have been granted to restrain conduct which was otherwise lawful but was rendered unlawful only because it was part of an unlawful conspiracy. (*Allen Bradley v. Local Union No. 3,* 325 U. S. 797; *cf.* decree on retrial, 164 F. 2d 71; *Lynch v. Magnavox,* 94 F. 2d 983.)

The Court of Appeals in the instant case takes no cognizance of the fact that participants in a conspiracy in restraint of trade have set a tort in motion (*Williamson v. Columbia Gas Corporation,* 110 F. 2d 15, 18; *Imperial Film Exchange v. General Film Co.,* 244 Fed. 985; *Farmers Co-op v. Socony Vacuum Oil,* 43 Fed. Supp. 735), and under established principles the wrong-doers are liable for all damage directly caused by their tort.

Anti-trust decisions have used language indicating that "It is the *source* of the injury, and not the character of the property injured, which constitutes the test of recovery." (*Dowd v. United Mine Workers,* 235 Fed. 1, cert. den. 242 U. S. 653.) In *Westmoreland Asbestos Co. v. Johns-Manville Corp.,* 39 Fed. Supp. 117, it was

said, "Nevertheless, the gist of an action under the anti-trust laws is the injury sustained by a plaintiff as a result of a conspiracy denounced by the statutes. The moment that a violation of these laws inflicts damage upon a person, he is possessed of a cause of action to redress the wrong he has suffered."

Conclusion.

In witholding "the windfall of treble damages," the Court of Appeals for the Ninth Circuit records a decision which turns the plaintiffs out of court and denies *all* relief, notwithstanding the defendants have violated the laws of the United States and in so doing have inflicted the hurt. Such a decision, it is submitted, could be justified only by an inescapable statute. The wrong-doing is clear; the statute which condemns the conduct provides punishment up to a year's imprisonment; the injuries are substantial. The statutory provision for recovery of damages uses mandatory language. The distinction made by the Court of Appeals appears to be against the language Congress selected to prevent any escape. Yet the decision says that the United States courts afford no remedy.

Lest the gravity of the injury done by the conspiracy be lost in a discussion of the legal principles abstracted from the facts, it should be added that the economic tragedy which is the basis of the Complaint struck thousands of wage earners; that persons trained in the specialized skills of the motion picture industry and grown to their work over decades were abruptly thrown out; that

many are still unable to get employment in the only work they know and can only look forward to what has so far been denied them, their day in Court.

The petition for certiorari should be granted.

Respectfully submitted,

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